

APPENDIX F

Contingency Re-routing

I. Introduction

In the event of a long-term route closure due to unforeseen circumstances, shipments may have to be rerouted to a less prepared or unprepared route. This paper presents the Topic Group's recommendations on how to implement Section 180(c) assistance if it becomes necessary to use unprepared or less prepared routes. The paper also provides background information on the issue and describes the options that the Topic Group considered.

II. Background

The U.S. Department of Transportation has said, through its preemption rulings, that hazardous materials emergency response training is not a prerequisite for hazardous materials shipments.

“Inadequacy of emergency response capabilities cannot provide basis for prohibiting transportation. *IR-18; *IR-18(A). Thus, non-Federal emergency response-related information requirements, such as a cleanup plan or vehicle equipment failure plan, cannot be used as a prerequisite to hazardous material transportation. #IR-19; *IR-27; #IR-28. *Colorado Pub. Utilities Comm'n v. Harmon, 951 F.2d 1571 (10th Cir. 1991), reversing No. 88-Z-1524 (D. Colo. 1989).”¹

However, this must be balanced against OCRWM's legal mandate to provide assistance along shipping routes and its mission “to manage and dispose of spent nuclear fuel and high-level radioactive waste in a manner that protects public health, safety, and the environment; enhances national and energy security; and merits public confidence².” Preparing routes prior to shipments can play a key role in meeting this mission.

The states firmly believe that:

“To maximize the effectiveness of the 180(c) program, the states must know which routes DOE will use prior to applying for assistance. Once routes have been identified, states must have sufficient time (a minimum of three years after routes are identified) to prepare those routes before shipments begin.”³

¹U.S. Department of Transportation, Research and Special Program Administration, *Index to Preemption, Emergency Response*, Office Chief Counsel, http://hazmat.dot.gov/dcc_interps.htm, 2003, pp. 12.

² <http://www.ocrwm.doe.gov/welcome.shtml>

³ “Principles of Agreement Among States On Expectations Regarding Preparations for OCRWM Shipments,” February 2005

III. Options Considered

The Topic Group considered two options for how to address 180(c) implementation for re-routing contingencies -- the *1998 Draft Policy* approach and a new approach outlined below. The *1998 Draft Policy* gave a broader definition of a contingency and a more specific remedy than the second option.

Option 1: *1998 Proposed Policy and Procedures*:

The *1998 Draft Policy* described three scenarios where contingency plans could be activated:

- 1) A route is selected too close to the start of shipments to allow for Section 180(c) implementation or adequate training.
- 2) A route is closed while a shipment is en route due to inclement weather, accidents, or other emergencies.
- 3) No training, or inappropriate training, has occurred along a route as a result of fraudulent actions or non-cooperation by a state or tribe along the route.

The *1998 Draft Policy* addresses these contingencies through the following:

“In general, eligible states and tribes may receive an additional amount of financial assistance if asked to complete activities in shorter amounts of time: i.e., a state or tribe may receive TY-1 and TY-2 funding in the same year ... [I]f for any reason the responsible jurisdictions along a selected route lack adequate training, OCRWM may use escorts with more training and equipment than those normally used for the purpose of security until a reasonable time period for training has expired.”

The strength of this approach is that it covers any scenario where training may not have occurred along a route. The weakness of this approach is that for the most part the scenarios listed are caused by poor planning, not unforeseen events, or apply only to short-term re-routing of individual shipments. It also dictates specific DOE actions, which reduces the flexibility of both the recipient and DOE in responding to unforeseen events.

Option 2: The Topic Group’s Proposal:

The Topic Group believes that instances of poor planning should not be considered in contingency planning, and agreed on the following definition of a routing contingency:

A contingency, for the purposes of the 180(c) program, is an occurrence such as an emergency route closure that turns into a long-term route closure that affects planned or on-going shipments. It is not because of a lack of planning or proper preparations.

They also felt that provisions for contingency re-routing should be broad and flexible enough to address the varied needs of different situations, rather than attempt to predict every conceivable scenario. The strength of this approach is that it has greater flexibility for all parties to negotiate appropriate actions in case of unforeseen events.

IV. Recommendation to Management

The Topic Group recommends adopting the second option for implementing Section 180(c) assistance if contingency re-routing becomes necessary, and agreed on the following language:

In the event of unforeseen circumstances, DOE will make funds available, if necessary, and consult with the affected state, local and tribal governments as necessary to reach a mutually acceptable solution.

The Topic Group further recommends that contingency re-routing be considered as part of a comprehensive transportation plan, rather than limiting the discussion to Section 180(c) concerns.